

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA
3

4 U-HAUL INTERNATIONAL, INC.,) Case No. 08CV1801-H(NLS)
5 et al.,)
6 Plaintiffs,) San Diego, California
7 vs.) Monday,
8 HIRE A HELPER, LLC, et al.,) April 13, 2009
9 Defendants.) 10:30 a.m.
)

10 TRANSCRIPT OF MOTION HEARING
11 BEFORE THE HONORABLE MARILYN L. HUFF
12 UNITED STATES DISTRICT JUDGE

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1 SAN DIEGO, CALIFORNIA MONDAY, APRIL 13, 2009 10:30 A.M.

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3 (Call to order of the Court.)

4 THE CLERK: Number nine on calendar, 08CV1801, U-
5 Haul International, Inc. versus Hire a Helper, LLC, for
6 motion hearing.

7 THE COURT: Good morning.

8 MR. HORNING: Good morning, your Honor.

9 THE COURT: State your appearances.

10 MR. HORNING: Duane Horning for the Defendants,
11 Hire a Helper, LLC, and Michael Glands (phonetic). And my
12 client, Mr. Glands, is present with me this morning.

13 THE COURT: Thank you.

14 MR. ZELKIND: Boris Zelkind of Knobbe, Martens, on
15 behalf of Plaintiffs, U-Haul, and with me is Maria Stout.

16 THE COURT: Thank you. Good morning.

17 The Court wanted you to come in and argue this
18 case. Typically, the law favors arbitrations, particularly
19 in these types of settings. This case has a little unusual
20 procedural history, since it came over from, I think,
21 Arizona. And so there are a couple of issues.

22 One is whether the arbitration clause actually
23 applies to these -- to this particular Defendant. And two,
24 whether it would be appropriate for the Court to enforce
25 arbitration.

1 There's a choice of law clause in the document to
2 apply the laws of the State of Arizona. Then there's also a
3 clause about injunctive relief.

4 And as I understand it, correct me if I'm wrong,
5 originally there was an application, or some type of request
6 in the District of Arizona for preliminary injunction, but
7 then nothing happened on that, or the court denied it.

8 MR. HORNING: The first part was correct, your
9 Honor. The complaint was filed along with a motion for
10 preliminary injunction by the Plaintiffs. And we opposed,
11 and there was a reply brief filed.

12 The court set a hearing that was initially set to
13 be considered both that proceeding and a motion that we, the
14 Defendants, had brought, to challenge jurisdiction and
15 venue. And so we had about an hour-and-a-half oral argument
16 where the court first considered the jurisdiction and venue
17 issues, and took those matters under submission. And we
18 just ran out of time for that day, and so the court set
19 another hearing later on for us to come back in the
20 preliminary injunction. And in the meantime, the court
21 ruled on our motion for injunction -- I'm sorry, for venue
22 and jurisdiction, and transferred the case here.

23 So, the Arizona court never actually ruled on, or
24 had oral argument on the motion for preliminary injunction.
25 So, the entire case was filed here on about October 3rd.

1 And the rules are a little bit different in Arizona than
2 they are in the Southern District of California. Here, as
3 the Court, of course, well knows, it's up to the parties to
4 request a hearing date, and the Plaintiffs never requested
5 that their motion for preliminary injunction, which they
6 filed in Arizona in July, be set for hearing here.

7 So, I've inquired several times about that, and
8 have been told that the Plaintiffs do not intend to set that
9 preliminary injunction motion for hearing. So, it's,
10 essentially, abandoned, even though it was fully briefed.

11 THE COURT: Is it -- are you withdrawing it
12 without prejudice?

13 MR. ZELKIND: Yes, your Honor. And I didn't have
14 the benefit of attending --

15 THE COURT: It didn't actually come over. The
16 case came, but because here we have a hearing, it's not
17 pending, although in my view, if you asked for it before and
18 you wanted to have it -- the Court rule upon it, the Court
19 could.

20 So, are you withdrawing that request at this time?

21 MR. ZELKIND: Yeah, without prejudice, your Honor.
22 We -- I was not retained to represent U-Haul until the case
23 was transferred here. So, I did not have the benefit of
24 either preparing those papers or arguing in Arizona. So,
25 yeah, we would prefer to withdraw that motion.

1 THE COURT: All right. Now, on the one thing is,
2 it is correct that -- both sides can be seated -- on a
3 request for injunctive relief, that would be something that
4 would not be the subject of arbitration. And the Court
5 would permit U-Haul, within the next 30 days, to decide
6 whether you wish to reapply for injunctive relief.

7 But, the Court's tentative here is actually to --
8 well, let me -- I think we should have it heard. So, on the
9 motion to compel arbitration there's an issue as to whether
10 U-Haul is within the scope of the arbitration clause.

11 So, who wishes to be heard first?

12 MR. HORNING: Your Honor, may I be heard?

13 THE COURT: You may. It's your motion, is that
14 right?

15 MR. HORNING: It is, your Honor. Thank you.

16 Your Honor, that is one of the essential issues,
17 and we would submit that in this case that the arbitration
18 clause absolutely does apply, and encompasses all of the
19 claims and all of the parties of this case.

20 I think it would be hard to find a broader
21 arbitration clause than the one here, which says, "All
22 claims related to or arising out of the agreement, or the
23 website," it's a very all encompassing clause.

24 THE COURT: I agree on that.

25 MR. HORNING: And so there is a carve-out in that

1 sentence that says, "Except as provided in this section,"
2 and that's Section 37, and that's a very long paragraph.
3 We've quoted the entirety in our brief. There's nothing in
4 that Section 37 that carves out any claims at all.

5 The closest it comes is in about the middle of
6 that paragraph, there's one sentence which says, "The
7 arbitrator shall not award injunctive relief," which we
8 interpret, your Honor, and the rules, I think, of contract
9 interpretation would support this, that by the very fact
10 that there's a sentence that says, "the arbitrator shall not
11 award injunctive relief," means a claim where injunctive
12 relief is possible, or even requested, could be -- and the
13 contract anticipates that it would be in front of the
14 arbitrator. But, then it just constrains the arbitrator's
15 authority from not actually granting that relief.

16 So, the --

17 THE COURT: Where is it that arbitrators can't do
18 injunctive relief, because they don't have the power? How
19 do you compel? It's by contempt, and what contempt powers
20 do they have? None.

21 MR. HORNING: That's, I think, true, your Honor.
22 I think in a different case that an arbitrator theoretically
23 could award injunctive relief, and then they would have to
24 be confirmed as a judgment, and then it would be enforced as
25 contempt.

1 THE COURT: I see.

2 MR. HORNING: But, that hasn't arisen here,
3 because the contract that the Plaintiffs drafted said that
4 everything gets arbitrated. Then it limits what the
5 arbitrator's authority is. One of them is injunctive
6 relief. It limits some other issues, which are not relevant
7 here, like no punitive damages, and some other things.

8 And so, it anticipates that where there is a claim
9 for injunctive relief, it will, in fact -- the claim itself
10 will be presented to the arbitrator on the merits. Was
11 there a breach of contract? Was there an infringement of a
12 property right, for example.

13 It's just the relief, as distinguished from the
14 claim, that is outside the arbitration. And there there are
15 many cases, your Honor, that specifically anticipate this
16 very circumstance. Perhaps because of the issue the Court
17 raised where if a party is to get an injunction, in order
18 for it to be effective it has to be by an actual judge
19 anyway. So, I think it's fairly common to carve out the
20 injunctive relief from the arbitration clause.

21 And there are many cases with specifically address
22 that and say, fine, go ahead and have your arbitration, or
23 in the meantime, if a party wants to, to preserve the status
24 quo, can bring an injunctive motion before the Court. That
25 doesn't change what gets arbitrated, that just, basically,

1 creates two parallel tracks.

2 THE COURT: Now, on trademark, is that -- is that
3 permissible for an arbitrator to rule on that?

4 MR. HORNING: Yes.

5 THE COURT: Has that been done? Is that common?

6 MR. HORNING: Absolutely, your Honor. Well,
7 "common," I can't speak to how common or uncommon, but it's
8 legally permissible.

9 We've briefed that issue, your Honor, and there's
10 no dispute on that. There was no opposition to that. It
11 was in our moving papers.

12 THE COURT: Can you address then the scope of the
13 arbitration agreement as it applies to U-Haul?

14 MR. HORNING: Yes, your Honor. Again, there's no
15 dispute on this point. We've had two pages of briefing that
16 U-Haul is subject to the arbitration clause. The opposition
17 was all of five lines, without a citation to any authority.

18 So, the law is that when there are non-
19 signatories, whose claims are closely intertwined with those
20 of the signatories, that non-parties are commonly brought in
21 to be subject to the arbitration clause.

22 So here, U-Haul has set up a wholly owned
23 subsidiary, E-Move (phonetic), created the contract where E-
24 Move is the party, assigned and licensed all of it's
25 property rights to E-Move, and is completely controlling and

1 directing E-Move. There's really only one unity of interest
2 among the -- between the Plaintiffs, U-Haul and E-Move.

3 They have one set of lawyers, one set of papers,
4 one set of -- one appearance at every proceeding. And I
5 think the argument could be made, actually, U-Haul has no
6 standing in this case at all anyway, because it's assigned
7 all of it's rights to it's subsidiary, E-Move. That issue
8 hasn't become relevant so far.

9 But, I think it makes the point that the claims
10 between U-Haul and E-Move are completely intertwined.

11 Your Honor, in our moving brief we cited, at one
12 point, all of the places that I could find in the complaint
13 where it refers to the Plaintiffs pursuing their claims
14 jointly. And we cited all those page, line references. And
15 there's dozens of times, your Honor, where the Plaintiffs
16 refer to their own claims as their claims, plural,
17 Plaintiffs'.

18 In fact, the third claim in this case is
19 specifically for breach of the subject contract. And even
20 there, the Plaintiffs jointly claim relief under that
21 contract, even though U-Haul is not a party.

22 So, U-Haul is seeking to enforce intellectual
23 property rights that derive from the contract, and enforce
24 the contract as a Plaintiff, as a named Plaintiff directly,
25 and through it's subsidiary.

1 Your Honor, the other point I would make is the
2 cases hold that if a party could avoid an arbitration clause
3 just by naming non-parties to the lawsuit, that would really
4 abrogate and nullify the effectiveness of an arbitration
5 clause.

6 THE COURT: All right. Let me hear from the
7 Plaintiffs.

8 MR. ZELKIND: Good morning, your Honor.

9 THE COURT: Good morning.

10 MR. ZELKIND: Actually, I have some bench books
11 that I prepared. I don't know if you --

12 THE COURT: You may submit them.

13 MR. ZELKIND: Your Honor, I would first like to
14 back up for a second and talk about the scope of the
15 arbitration clause in this particular agreement, because I
16 think that what Defendants have been arguing is that we
17 should only be looking at paragraph 34 of the agreement,
18 which is entitled, "Arbitration."

19 But, what is important to note about this
20 agreement is paragraph 44. It was attached several places.
21 It was attached as Exhibit A in the opening brief. But,
22 paragraph 44 specifically states that the headings here are
23 purely contained as a convenience, and should not be
24 interpreted as helping to provide meaning to any of the
25 paragraphs therein.

1 So, we have to look at the agreement as a whole,
2 which Defendants do acknowledge, that you need to look at
3 the entire agreement. And by the way, the reference to
4 paragraph 44 is contained in the bench book, I believe it is
5 tab three.

6 THE COURT: It is.

7 MR. ZELKIND: And if we look at the entirety of
8 the agreement, we see that there's several paragraphs that
9 specifically indicate that the agreement was contemplated to
10 litigate issues of intellectual property disputes, and to
11 arbitrate the rest of the disputes that may arise from this
12 agreement.

13 And what's important to note is, what is the
14 nature of this agreement? This is a service provision
15 agreement. This is not intellectual property license.

16 So, this agreement governed the way that a service
17 provider that joined the E-Move marketplace would operate
18 within this marketplace. And so there are various
19 provisions here that do not give rise to the situation where
20 monetary relief would be insufficient.

21 For instance, if you look at paragraph seven
22 through 13, there is countless different disputes that may
23 arise dealing with the way fees are distributed. Whether
24 the appropriate services were provided to the customer
25 seeking the labor services. Whether the appropriate

1 accounts, debit accounts were used.

2 But, if we look specifically to the kind of
3 disputes that were envisioned to be litigated, we see
4 paragraph -- and if we turn to tab two -- there are three
5 specific paragraphs that are relevant.

6 Paragraph 26, and in tab two I'm summarizing, and
7 further on there is the actual language. But, paragraph two
8 specifically points out that monetary damages are
9 insufficient misuse of intellectual property.

10 Paragraph 48, which is entitled, "Governing law."
11 But, it specifically says that if a party seeks injunctive
12 relief in a court of law, or seeks injunctive relief, courts
13 of law have exclusive jurisdiction, and it doesn't
14 differentiate between preliminary injunctions or permanent
15 injunctions. Plaintiffs have not abandoned their request
16 for injunctive relief.

17 And finally, paragraph 34, which is labeled,
18 "Arbitration," specifically references the fact that seeking
19 an injunction --

20 THE COURT: So, you're saying that while you've
21 withdrawn your request for preliminary injunctive relief,
22 you're seeking permanent injunctive relief?

23 MR. ZELKIND: Absolutely. That is throughout the
24 complaint.

25 THE COURT: So, say there's no request for

1 preliminary injunction, if monetary damages are sufficient,
2 then at the end of the case then the Court would not need to
3 do injunctive relief? So, why couldn't it go to arbitration
4 first, and then on any confirmation of any award, if
5 permanent injunction is also requested within one year of
6 any dismissal here, it would come back to this Court. So,
7 why couldn't that --

8 MR. ZELKIND: Because ultimately the -- because
9 ultimately the question of arbitration is one of contract.
10 And we have to look at what did the parties intend, and what
11 did the parties agree to?

12 The parties here agreed to litigate issues
13 involving intellectual property disputes. Like I said, if
14 we look at specific language of paragraph 26, which is tab
15 four. I've highlighted certain language, this is actual
16 excerpts from the paragraph.

17 Paragraph 26 describes that intellectual -- that
18 our information includes the sole and exclusive intellectual
19 property and proprietary information. The parties
20 specifically contracted that any disclosure of this
21 information -- and this is, by the way, where the breach of
22 contract claim arises -- is the disclosure -- not because
23 fees weren't collected properly or fees weren't distributed
24 properly, but it was specifically because intellectual
25 property was alleged to have been taken and misused by the

1 Defendants.

2 The parties specifically agreed that such
3 disclosure or misuse of intellectual property will be
4 challenged in a court of law. And specifically, the parties
5 agreed that monetary damages provide an insufficient remedy
6 for breach of confidential obligation for misuse of
7 intellectual property.

8 THE COURT: All right. What causes of action or
9 claims do you have in your complaint?

10 MR. ZELKIND: These are all intellectual property
11 based. There is a trademark misappropriation -- sorry,
12 there's trademark infringement, there's copyright
13 infringement, there's trade secret misappropriation.

14 THE COURT: But, copyright, so any disclosure --
15 how does the copyright come in here?

16 MR. ZELKIND: Well, if we look at paragraph 26, it
17 specifically describes that intellectual property is a part
18 of the definition of what is our information. And the
19 following provisions, paragraph 27, 28, specifically address
20 trademark infringement or trademark rights, and then
21 copyrights, because this is an electronic marketplace, and
22 so E-Move has asserted copyrights in the various components
23 of -- and the compilation of components of it's websites.

24 And paragraph 48, which is in tab five, which is
25 specifically styled governing law, I believe, says that in

1 the event that injunctive relief is sought by E-Move, courts
2 shall have exclusive jurisdiction --

3 THE COURT: What courts? This is where I said
4 that it's kind of interesting, because you're saying the
5 Court has to have jurisdiction -- has to do it, not an
6 arbitrator. But, the choice of law is the Court of Arizona
7 shall have exclusive jurisdiction over any dispute arising
8 under this agreement. And Arizona bounced it to us.

9 MR. ZELKIND: Well, Plaintiffs brought the case
10 there. Plaintiffs attempted to enforce this -- enforce the
11 specific choice of law provision.

12 THE COURT: Can I retransfer it back? I think
13 it's pretty clear. Injunctive relief is supposed to be in
14 Arizona.

15 MR. ZELKIND: I agree, your Honor. I wish I had a
16 chance to have argued that motion.

17 But, nonetheless, I think that while it talks
18 about which specific courts, it does specifically talk
19 about, and show the intent of the parties, that injunctive
20 relief, and this doesn't again parse out preliminary versus
21 permanent injunctive relief, is to be determined in a court
22 of law. All other disputes shall be resolved by binding
23 arbitration.

24 And like I said, there are a lot of disputes that
25 can arise under this service agreement that don't involve

1 intellectual property rights. That can be sufficiently
2 remedied by a damages award. And I have highlighted certain
3 of the paragraphs, I think it's in tab seven, that we talk
4 about that.

5 THE COURT: Now, the District Court in Arizona
6 felt that there was insufficient personal jurisdiction over
7 the Defendant or what was for venue?

8 MR. ZELKIND: I believe that it was a transfer of
9 venue for convenience.

10 THE COURT: "For convenience?"

11 MR. HORNING: Your Honor, there were three named
12 Defendants. As to one Defendant, Amy Glands, the Court
13 ruled that there was lack of personal jurisdiction. As to
14 Defendant Michael Glands, the Court ruled against us on that
15 point, and ruled there was personal jurisdiction, and then
16 on Hire a Helper reserved. And then went to the issue of
17 convenience, and ended up transferring the case here based
18 on convenience because of third party witnesses, and also
19 because of the relative size of the parties, the Defendants
20 being here in the Southern District, transferred the matter
21 here. And then coming back to the jurisdiction question of
22 Hire a Helper, that issue was then moot. The case having
23 been transferred to the Southern District and did not reach
24 the jurisdiction issue over Hire a Helper.

25 MR. ZELKIND: And Defendants say that we shouldn't

1 be looking at paragraph 48, because they say the subject, by
2 it's title and terms, does not deal with the scope of
3 arbitration.

4 But, if we're looking at the agreement as a whole,
5 and we're trying to analyze whether -- what are the
6 arbitration terms of this agreement as a whole, there's no
7 question that paragraph 48 specifically addresses the scope
8 of arbitration. It says that all other disputes shall be
9 resolved in accordance with a mandatory binding arbitration
10 provision.

11 So, we can't dismiss this clause merely because it
12 has a specific title, which while -- even if there wasn't
13 paragraph 44, which says -- the parties specifically state
14 that the titles aren't to be used for limiting the scope of
15 the terms. But, even without that provision, it's still
16 very clear that on it's face paragraph 48 deals with the
17 scope of the arbitration clause.

18 And paragraph 34 specifically says -- and again, I
19 think this is really critical because there are two aspects
20 of this arbitration provision that weren't discussed by the
21 Defendants.

22 One is that the clause opens, except as set forth
23 later in this section. So, it's not a broad, unlimited
24 statement as the Plaintiffs said when they first got up
25 here, that any dispute, legal controversy or legal action.

1 No. It says, "Except as set forth later in this section any
2 dispute legal controversy." So, clearly, there's a carve
3 out here.

4 If we look at what the parties intended, the
5 parties intended for intellectual property disputes, or
6 other disputes where monetary damages are an insufficient
7 remedy, that those need to be addressed in a court of law.
8 While those disputes that -- the more run of the mill issues
9 that arise out of a service provider operating and
10 performing within the E-Move marketplace, those kinds of
11 issues can be dealt with in arbitration. They can decide
12 whether appropriate fees were distributed, whether fees were
13 collected, whether appropriate representations were made to
14 the customers. Dealing with the customers and disputes
15 arising out of dealing with the customers. Those kind of
16 issues should be arbitrated on disagreement.

17 The claims that are involved in this case only
18 relate to this agreement in the sense that the relationship
19 between the parties happened, and particularly we're talking
20 about E-Move and the Glands, because of this agreement.

21 The Glands gained access to various intellectual
22 property as a result of signing up to participate as a labor
23 service provider.

24 The other issue that I want to hit on that I think
25 is very important, is that Hire a Helper, the other co-

1 Defendant, should not be allowed to enforce or compel
2 arbitration when they were not only not a party to the
3 agreement, if the Court does decide that the agreement
4 requires arbitration, but they didn't even exist as a
5 company at the time that Glands' signed the agreement, and
6 at the time that Glands' operated under the agreement.

7 In fact, when transferring the case here to the
8 Southern District, Hire a Helper specifically argued that
9 they weren't bound by the agreement, and --

10 THE COURT: And that's how they got out of the
11 choice of law?

12 MR. ZELKIND: That's right. And so they're
13 judicially estopped because the court actually relied on
14 that argument. The court distinguished Glands' situation
15 from Hire a Helper's situation.

16 So, it's both disingenuous and actually
17 inappropriate under the estoppel principles for Hire a
18 Helper to argue. There they're arguing that they are not
19 bound by the agreement, but here saying that they are
20 beneficiaries or agents of the agreement, when they're
21 already taken that position and, obviously, the court relied
22 on that in a different jurisdiction.

23 THE COURT: Thank you. Any brief response?

24 MR. HORNING: Yes, your Honor, if I may. I think
25 what would be particularly helpful in this case is to

1 specifically consider the case of Remey, which we've cited
2 in our brief, and I have a copy of that case, if I may, with
3 a portion of it highlighted. If I may offer that, your
4 Honor?

5 THE COURT: You may.

6 MR. HORNING: Your Honor, the context of Remey is
7 a very similar situation as here, where a plaintiff filed in
8 court, a defendant moved to compel arbitration, and the
9 plaintiff said, "no, we want to get injunctive relief." And
10 that's a carve out. And so that was addressed by the court,
11 and the relevant and most important part of it is on the
12 page that I've tabbed that begins on the Court record at
13 page -- the reported decision 217 to 218, it's on page six
14 of the document we have in front of us now.

15 The court addressed a very important point in that
16 case, which is very applicable here. And that is, in
17 interpreting a contract that what a court must do is discern
18 the intent of the parties, taking the contract as a whole.
19 And where there's a -- where one interpretation would result
20 in a conflict within the contract, and another
21 interpretation would not, then the preference is to be given
22 to no conflict, particularly where that leads to
23 arbitration, which is also the preferred interpretation
24 under the contract.

25 THE COURT: Do I -- well, on Remey, one, it's a

1 District Court case, and I often say it's like citing neon
2 law. And two, it's not even Ninth Circuit. But, often
3 because these issues arise in the District Court it's at
4 least illustrative of the issues that the Court has to deal
5 with.

6 Do I -- could you address -- obviously, the
7 District Court in Arizona didn't follow the choice of law,
8 so do I infer from that that on the judicial estoppel that
9 the District Court did consider that your client had said
10 that the arbitration clause doesn't apply in transferring it
11 here.

12 MR. HORNING: Your Honor, I did participate in the
13 proceedings in Arizona. And what's represented is not
14 correct. First of all, the choice of law clause did not
15 arise. The choice of venue clause did arise. That was
16 considered by the court, and the court did find it was a
17 factor as to Defendant Glands, and was a factor that weighed
18 in favor of keeping the case in Arizona. There were many
19 other factors that over weighed that factor, and the court
20 cited law, which is correct, that a choice of venue clause
21 is not controlling, it's one factor to be considered, among
22 others. And the court weighed multiple factors and
23 determined there were other more important factors, like
24 third party witnesses.

25 The court ruled that the choice of venue provision

1 did not apply to Hire a Helper because Hire a Helper was not
2 a party to the contract, did not exist at the time the
3 contract was formed.

4 But, your Honor, what the Defendants have not --
5 and Plaintiffs have not addressed at all in their papers or
6 today, is the doctrine of separability. So, under the
7 doctrine of separability, specifically in arbitration
8 context, parties are allowed to contest, resist, object to
9 the contract, that's enforceability, it's validity to
10 everything else, except for arbitration, which is separate.

11 And so, your Honor, the parties had the latitude
12 to take that very position to -- and we do contest many
13 aspects of this contract as Defendants. But, as to the
14 arbitration clause, the authorities hold that separate.

15 What the Plaintiffs do is the very opposite, has
16 no authority for it. The Plaintiffs want to enforce the
17 entirety of the contract as to both Plaintiffs and both
18 Defendants on all contract terms, except arbitration.
19 There's no authority for that proposition. But, there is
20 authority for the reverse, which is proper to say, wait, as
21 to arbitration we're going to carve just the arbitration
22 out.

23 Your Honor, the other point I'd like to address.
24 Several times my esteemed colleague said that we wanted to
25 ignore Section 48. Not the case. We've never taken that

1 position. To the contrary, our position is, the entirety of
2 the contract needs to be looked at, Section 34 and Section
3 48 both, as well as all other provisions. We're not relying
4 on headings, we're looking at the text in those paragraphs,
5 in those sections. And in Section 34 it is a broad clause,
6 except as contained in this section, Section 34. There is
7 no carve out in Section 34.

8 And so Plaintiffs' interpretation would set up a
9 conflict between Section 48 and Section 34. And the rules
10 of contract interpretation hold, no, when there's a
11 potential conflict the Court must construe them both
12 together and find the intent of the parties.

13 THE COURT: All right. Thank you. I'm going to
14 submit the matter. Thank you for coming here. This could
15 potentially be a perfect law school examination on civil
16 procedure on a number of different issues. Thank you.

17 MR. ZELKIND: Thank you, your Honor.

18 THE COURT: I'll consider your positions and then
19 issue a ruling.

20 MR. ZELKIND: Thank you, your Honor.

21 MR. HORNING: Thank you, your Honor.

22 THE COURT: Thank you. Your argument was
23 excellent on both sides.

24 (Proceedings concluded.)
25

1 I certify that the foregoing is a correct
2 transcript from the digital sound recording of the
3 proceedings in the above-entitled matter.

4
5
6 /s/Holly Martens 4/27/09
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